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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted]5

FRANK JAMES LUPPER, *et al.*,

Petitioners,

—v.—

STATE OF ARKANSAS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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—v.—

STATE OF ARKANSAS,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Arkansas, entered in the above-entitled case on May 13, 1963, rehearing of which was denied on June 3, 1963.

Citation to Opinions Below

The opinion of the Supreme Court of Arkansas (R. 117) is reported at 367 S. W. 2d 750. The opinion of the Supreme Court of Arkansas on petition for rehearing (R. 134) is reported at 367 S. W. 2d 760.

Jurisdiction

The judgment of the Supreme Court of Arkansas (R. 132) was entered on May 13, 1963. The petition for rehearing was denied (R. 134) on June 3, 1963.

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1257(3), petitioners having asserted below and asserting here, deprivation of rights, privileges and immunities secured by the Constitution of the United States.

Question Presented

Whether the due process and equal protection clauses of the Fourteenth Amendment permit a state to use its executive and judiciary to enforce racial discrimination in conformity with a state custom of discrimination by arresting and convicting petitioners of refusal to leave the premises of a business which has for profit opened its property to the general public.

Statutory and Constitutional Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves Section 41-1433 of the Arkansas Statutes (Acts 1959, No. 14, §1, p. 29):

> "Any person who after having entered the business premises of any other person, firm or corporation, other than a common carrier, and who shall refuse to depart therefrom upon request of the owner or manager of such business establishment, shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00), or by imprisonment not to exceed thirty (30) days, or both such fine and imprisonment."

Statement

Between 11:30 A.M. and 12:00 noon on April 13, 1960, petitioners entered the Blass Department Store in Little Rock, Arkansas. Petitioners, part of a group of five or more Negroes (R. 72), proceeded upstairs from the main floor to the mezzanine, where a lunch counter and several tables are located (R. 37, 59). Mr. Henry Holt, store manager, testified that petitioners were among the group which took seats at the lunch counter and tables (R. 65-66) and that although he identified himself as store manager (R. 72) and asked them to leave (R. 65), the petitioners refused to do so (R. 65).[1] Upon their refusal to leave, Mr. Holt and Mr. Trianfonte, assistant store superintendent, left the premises and sought the police (R. 66).[2] Captain Paul Terrell of the Little Rock Police Department testified that he, Lieutenant Talbert and Officers Baer and Thomas were standing across the street from the store (R. 35, 66) when Mr. Holt and Mr. Trianfonte approached them and complained that "they had colored boys" (R. 35). The policemen entered the store and saw the petitioners on the main floor (R. 36). Captain Terrell, Lieutenant Talbert and Officer Baer testified (R. 36-37, 45, 52, 54) that they asked the petitioners whether they had been seated upstairs and whether they had refused to leave upon request. According to these policemen, the petitioners admitted that they had (R. 37, 45, 52, 54).[3] Then petitioners were arrested.

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[1] Petitioners denied that they had been asked to leave (R. 79, 85, 89, 98-99).

[2] They were not difficult to find since Officer Baer had telephoned headquarters when he saw the Negroes entering the store (R. 51).

[3] Petitioners disputed this (R. 79, 84, 89, 98).

It is undisputed that petitioners were at all times neat, quiet and orderly (R. 39, 48, 59, 68).[4]

Petitioners were charged with breach of the peace in violation of Section 41-1432, Arkansas Statutes (Section 1 of Act 226 of 1959) and with refusal to leave a business establishment after request in violation of Section 41-1433, Arkansas Statutes (Section 1 of Act 14 of 1959).

They were tried on April 21, 1960 in the Municipal Court of Little Rock and convicted on both charges (R. 1, 3). Thereupon they appealed to the Pulaski County Circuit Court, where trial was had before a jury on June 17, 1960. Each was again convicted on both charges and each received a fine of $500.00 and 6 months' imprisonment on the Act 226 violation and a fine of $500.00 and 30 days' imprisonment on the Act 14 violation (R. 16-17).

Thereafter, the petitioners took an appeal to the Supreme Court of Arkansas. This appeal was consolidated for briefing with *Briggs* v. *State* (no. 4992) and *Smith* v. *State* (no. 4994) (R. 118; appendix, *infra*, p. 3a). On May 13, 1963, the Supreme Court of Arkansas handed down its decision, reversing all the Act 226 convictions for lack of evidence and affirming the Act 14 convictions of the petitioners. The petitioners petitioned the Supreme Court of Arkansas for rehearing (R. 133; appendix, *infra*, p. 17a) which was denied (R. 134; appendix, *infra*, p. 18a) on June 3, 1963.

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[4] This fact dictated reversal of petitioners' convictions of breach of the peace by the Supreme Court of Arkansas (R. 117-123; appendix, *infra*, pp. 1a-7a).

How the Federal Questions Were Raised and Decided Below

Prior to trial in the Pulaski County Circuit Court, First Division, petitioners filed a motion to dismiss as to Act 14 (Arkansas Statutes §41-1433).

Petitioners alleged (R. 9-10):

2. That there is a violation of the equal protection and the due process clauses of the Fourteenth Amendment to the United States Constitution in that an instrumentality of the State—by the judicial enforcement of Act 14—is being utilized against these defendants to prevent them and all other Negroes from securing equality of treatment by peaceful persuasion.

3. That there is a violation of due process of law in that an instrumentality of the State seeks to compel the adherence to an arbitrary standard applied to Negro invitees by private establishments by the enforcement of Act 14, all in violation of the Fourteenth Amendment to the Constitution of the United States.

4. That there is a violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, in that the State has made available to private establishments—by the enforcement of Act 14—the full coercive power of government to aid in the discrimination of Negro invitees because of their race and color.

5. That there is a violation of the Constitution of the United States in that the State is using its criminal statutes to maintain racial segregation and discrimination.

The motion was overruled (R. 16). Similar objections were raised in a motion to quash or dismiss the information (R. 11-15), which also was overruled (R. 16).

At the close of the prosecution's case, petitioners moved for a directed verdict of not guilty as to each defendant as to the alleged violation of Act 14 (R. 75). The motion was overruled (R. 76). Following the verdict of guilty on both charges, petitioners moved for a new trial (R. 18), renewing their constitutional claims raised in the motion to dismiss. This motion also was overruled (R. 20).

Petitioners appealed to the Supreme Court of Arkansas, which affirmed the convictions under Act 14.

The Supreme Court of Arkansas declared (R. 126-127; appendix, *infra*, p. 10a):

> Appellants further assert that the Act has been unconstitutionally applied in that the enforcement of such Act amounts to "state action" in violation of the 14th Amendment to the Federal Constitution. They cite, *inter alia*, *Shelley* v. *Kraemer*, 334 U. S. 1, 68 Sup. Ct. 836, 92 L. Ed. 1161; *Hurd* v. *Hodge*, 334 U. S. 24, 68 Sup. 847, 92 L. Ed, 1187; *Barrows v. Jackson*, 346 U. S. 249, 73 Sup. Ct. 1031, 97 L. Ed. 1586. . . . This argument is completely untenable. . . .

The Supreme Court of Arkansas further declared:

> It can add nothing to the argument to say that they [lunch counter operators] did not want appellants because of their color because appellants had no basic right to be served and the State's action in enforcing criminal laws against trespass cannot be held to be "state action" abridging the privileges or immunities of citizens of the United States (R. 128; appendix, *infra*, p. 12a).

> [T]he act of discrimination in refusing service is that of the individual and thus not subject to the interdiction of the Fourteenth Amendment (R. 130; appendix, *infra*, p. 13a).
>
> [I]t makes no difference as to why the individual lunch counter operator did not want the appellants on the premises, because if they remained after a request to leave they became trespassers and the State prosecuted for trespass and not to enforce discrimination (R. 130; appendix, *infra*, p. 13a).

The Supreme Court of Arkansas had delayed decision of the appeal since January 16, 1961 (R. 117; appendix, *infra*, p. 2a) awaiting the decision by this Court of *Avent* v. *North Carolina*, 373 U. S. 375; *Peterson* v. *City of Greenville*, 373 U. S. 244; and *Lombard* v. *Louisiana*, 373 U. S. 267. Nevertheless, the court delivered its original opinion on May 13, 1963. Following this Court's disposition of the *Avent*, *Peterson* and *Lombard* cases the Supreme Court of Arkansas entertained a petition for rehearing and on June 3, 1963 denied rehearing (R. 134-135; appendix, *infra*, p. 17a) on the ground that there was no evidence that "the decision of the Manager in the case at bar to exclude these petitioners from the lunch room was anything except the exercise of freedom of choice" (R. 135; appendix, *infra*, p. 18a).

Reasons for Granting the Writ

This case involves substantial questions affecting important constitutional rights, resolved by the court below in conflict with principles expressed by this Court. This Court now has under consideration several cases presenting substantially identical issues. *Griffin* v. *Maryland*, No. 6, cert. granted, 370 U. S. 935, set down for reargument, 373 U. S. 920; *Barr* v. *City of Columbia*, No. 9, cert. granted,

374 U. S. 805; *Bouie* v. *City of Columbia*, No. 10, cert. granted, 374 U. S. 805; *Bell* v. *Maryland*, No. 12, cert. granted, 374 U. S. 805; *Robinson* v. *Florida*, No. 60, probable jurisdiction noted, 374 U. S. 803.

I.

Petitioners Convictions Enforce Racial Discrimination in Violation of the Fourteenth Amendment to the Constitution of the United States.

Indusputably, petitioners convictions in this case rest upon and constitute racial discrimination against them. Petitioners are Negro students who, at the very worst,[5] sat at food service counters and tables insisting upon service which was refused pursuant to the establishment's racially exclusionary policies.

In the words of Mr. Holt, the manager of Blass Department Store, "I went to the balcony lunch room during the lunch hour and observed there were five negro boys sitting in the lunch room, three of them at the counter and two of them at tables. I told each one of them in turn that I didn't want any disturbance, but I did ask them to leave" (R. 65). It mattered only that they were "Negro" boys. Their conduct, dress, and demeanor were above reproach (R. 39, 48, 59, 68), and they were welcome—as they had always been before—in other departments of the store (R. 86, 91). But because they were Negroes and they were requesting service in the lunchroom, they were asked to leave.[6]

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[5] Petitioner Robinson denied that he ever sat down in the lunch room (R. 89).

[6] The record contains no explicit acknowledgment by store personnel that the lunchroom was operated exclusively for white customers but the entire record is inconsistent with any contrary proposition. The Supreme Court of Arkansas said, "The prosecutions arise out of the activities of the defendants in seeking to be served at eating facilities maintained for whites, the defendants being Negroes (R. 118; appendix, *infra*, p. 3a).

Clearly, then, this case involves discrimination based on color, "simply that and nothing more" (*Buchanan* v. *Warley*, 245 U. S. 60, 73), and it is no longer arguable that such discriminations by government are valid. Racial discriminations have been held repeatedly to violate the due process and equal protection clauses of the Fourteenth Amendment and the due process clause of the Fifth Amendment. *Brown* v. *Board of Education*, 347 U. S. 483; *Bolling* v. *Sharpe*, 347 U. S. 497; *Cooper* v. *Aaron*, 358 U. S. 1; *Goss* v. *Board of Education*, 373 U. S. 683; *Peterson* v. *City of Greenville*, 373 U. S. 244,

The doctrine of *Shelley* v. *Kraemer*, 334 U. S. 1, is clearly applicable. Unless that case is to be overruled (or, what is the same thing, irrationally "confined to its own facts"), it is settled law that there are some cases in which the "state action" requisite for invocation of the Fourteenth Amendment is to be found in the use of the judicial power to enforce a privately-originated scheme of racial discrimination.

It is unthinkable that *Shelley* is to be overruled. It has been followed and approvingly cited in this Court.[7] It is unlikely that there is now much disagreement with its broader principle; who, for example, would now think it right to uphold the action of a state court in ordering specific performance, by one restaurateur who wanted to desegregate, of an agreement among all the restaurateurs in a town to retain segregation? Yet such an injunction, absent the Fourteenth Amendment, would be well within the equity categories governing the administration of the

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[7] *Trustees of the Monroe Avenue Church of Christ* v. *Perkins*, 334 U. S. 813 (1948).
Barrows v. *Jackson*, 346 U. S. 249 (1953).

[8] *Hurd* v. *Hodge*, 334 U. S. 24, 33 (1948).
Cooper v. *Aaron*, 358 U. S. 1, 17 (1958).

private-law remedy of specific performance, as a state might choose to develop them.

As Professor Henkin, one of the most thoughtful analysts of *Shelley* has said: "*Shelley* v. *Kraemer* was not wrongly decided. It is not a special case. It need not be rejected; it need not be narrowly limited." Henkin, "*Shelley* v. *Kraemer*: Notes For A Revised Opinion," 110 U. Pa. L. Rev. 473, 491 (1962).

But if the *Shelley* principle has living force, it is hard to see why it should not apply here. This case is stronger than *Shelley*. In *Shelley*, the state action immediately involved consisted (aside from the furnishing of recordation machinery) in keeping the courts open for the filing of complaints that asked injunctive relief, in granting such relief when asked by a private party, and in standing by with the contempt machinery for use in the event the private party might invoke that machinery. In this case, the police were readily available nearby and made the arrests after the conduct complained of had ceased. The public prosecutor, supported by the public fisc, carried the case to court. Most crucially, the case was a criminal prosecution, in which the state appears as a party, *in its own interest*, in knowing support of the discriminatory scheme, which it thereby sanctions within the public order of its criminal law, and not merely within the framework of its dealing with private rights. The State of Arkansas has taken on this case as its own from the first policeman's intervention to the last argument in this Court; it must be a paradoxical distinction indeed which could find "state action" in the private-law umpiring performed by the state in *Shelley* v. *Kraemer*, and not find it here.

It has been urged that *Shelley* involved contract rights, while this case involves property rights; but this distinction,

aside from its obvious unviability in the robust air of a constitutional context, is not even descriptively accurate, for the covenant that runs with the land creates a kind of property interest, described in the state court's opinion in a companion case to *Shelley*, as "reciprocal negative easements."[9] Substantially, the right asserted in *Shelley* was more weighty than that asserted here; if one really dislikes Negroes, having a Negro as a next-door neighbor is more disagreeable than selling a Negro a sandwich—or, more accurately, having to endure his sitting and ordering a sandwich.

It is asserted that the state is not enforcing racial discrimination, but implementing a property right. The distinction is a false one; the state is enforcing racial discrimination *by* implementing a property right, just as in *Shelley* the state was enforcing racial discrimination by implementing a contract right which was also a property right.

In addition to its action in arresting these petitioners, prosecuting them in its courts, and condemning them to jail, the State of Arkansas bears responsibility for the enforcement of racial discrimination because the property owner formulated his discriminatory policy in obedience to a widespread custom which has been confirmed and maintained by state law. Where the individual act of segregation is performed substantially under the influence of a statewide public custom of segregation, and where this widespread public custom has in turn been substantially supported by formal state law, then the act of segregation is infected with state power.

The unfolding of this proposition requires a few words. First, its submission is that where the causal connection

[9] See record in U. S. Supreme Court in *McGhee v. Sipes*, 334 U. S. 1, No. 87, Oct. Term, 1947, p. 51.

of the segregation with custom is *substantial*, and not only where that connection amounts to practical coercion, the required nexus is present; similarly, where state law has *substantially* supported the custom of segregation, and not only where it is the sole force behind that custom, state action is traceable in the custom. These propositions are conformed to the *Civil Rights Cases* statement that "some" state action is enough (109 U. S. 3, 13) as well as with the "significant extent" criterion in *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722.

Secondly, there is no principled reason for finding state action only in those cases where state law presently in force supports the segregation custom; states, like men, are to be charged with the consequences of what they do, even when those consequences follow after the act that produced them is finished, or even repented. The maintenance for generations of a *de jure* segregated regime has its consequences after the laws are changed, and the rules of "state action" ought to give effect to this obvious social truth. The purpose of tracing out this chain of causation is not the penalization of the present state officials, but the resolution of the issue whether in fact state power is a substantial factor in the discrimination complained of.

Thirdly, it is not dispositive of the question of the causal nexus between state law and state custom to show that the segregation code of the state did not contain a provision specifically commanding the very sort of segregation involved in the case. A reasonably comprehensive segregation code surely contributes to some extent to the likelihood that segregation will be observed as a general custom even where that code does not specifically command it.

It remains to deal with questions of burden of proof. Two issues are important: (1) If it appears that a custom of segregation exists, and that a proprietor segregates in

factual conformity to that custom, on whom should the burden rest with respect to the issue of his being to some extent influenced by the custom? (2) If it appears that a custom of segregation exists, and it further appears that the state in question has in force or until recent times has had in force a system of legal dispensations sanctioning segregation, on whom should the burden rest with respect to the issue of substantial causal connection between the custom and that legal regime?

9 Wigmore, *Evidence* (3d ed., 1940) §2486, states the general rule on the allocation of the burden of proof: "The truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations." And, again, ". . . [T]his apportionment depends ultimately on broad considerations of policy . . ." *id.*, §2488.

It is not doubtful where these considerations lead, with respect to the two numbered questions just put.

As to the first: It can surely be recognized by this Court, as a broad fact of human nature, that men are rarely wholly isolated from the settled customs of their communities, and that the notion of a man's acting in exact conformity to custom, but without being influenced in any substantial way by the existence of the custom, is virtually a paradox. If this be doubted in the general case, surely it cannot be doubted in the case of the proprietor catering to the public; his business success may depend on his conformity to community custom. And of course the business motive of pleasing his customers by conformity is not a *different* motive from conformity to custom, but that very motive itself, in one of its varieties of incidence. Given these facts, which it is hard to think anyone will care seriously to dispute, it is plain that the burden of proof, and a very heavy

one, ought to be placed on the assertor of the proposition that some individual is that *rara avis*, a man who is in business catering to the public, and who factually conforms to public custom, but who does so *solely* from self-generated causes, and without any reference to the custom's existence.

As the second numbered question, the case seems equally plain, particularly in the light of the broad history of segregation. There is good, historic ground for the belief that the segregation system was brought into being or at least licked into shape, by state law. See Woodward, *The Strange Career of Jim Crow* (1957), 16-22, 81-85, 91-93, *et passim*. Against that historic background, the issue is whether one should have to prove that custom was to some extent the function of law aimed at structuring the custom, or whether the opponent should have to prove that it was not. It is clear that the *total* lack of such a causal relation is the thing for which proof should be required. And it should be especially noted that, in cases such as the present, the assertor of the proposition that no causal relation exists between law and custom, that they have moved in a Cartesian parallelism, is the very state that maintained the legal provisions, now perceived to be unconstitutional, that were aimed at shoring up the custom; surely something not far from estoppel should at the least prevent the state's benefiting from the assumption that its own efforts were vain, without even adducing proof. Cf. *Peterson* v. *Greenville*, 373 U. S. 244, 248: "The State *will not be heard* to make this contention in support of the convictions." (Emphasis supplied.) Cf. also Mr. Justice Harlan's concurrence in the same case, 373 U. S. at 252.

If these substantive and evidentiary principles are right, their application to the instant case is plain. This Court will hardly require citation to the propositions that the State of Arkansas, and the City of *Cooper* v. *Aaron*, *supra*,

has a public custom of segregation of the races, and has fostered and maintained that custom by law.[10] Any denial that segregation is at least in substantial part the doing of the state is an assertion that the deepest policies and most comprehensive laws of the state have been mere works of supererogation. The state ought at least be required to prove such a strange assertion. The natural inference, from the roughest knowledge of the recent history of Arkansas is that segregation in public places such as that involved in this case, takes place substantially because a state-wide public custom, supported by state laws abandoned only under extreme pressure, commands that it shall take place.

Moreover, even if either the state-created custom or the use of state police, prosecutor, attorney-general and courts be in itself an insufficient element of state action, nevertheless, in co-action, they are indisputably sufficient. This record, in a social context that is a matter of common knowledge, presents the picture of a segregation performed in obedience to a custom which is at least in substantial part a creature of state law; the action so motivated is then supported and enforced by prosecutions conducted by state officials, and by convictions in state courts. If "state action" is not to be found in such cases, then the "state action" concept has suffered some weird transformation from the coordinates of reality, and can be of no use in the process of adjusting constitutional interests. One need not doubt what the judgment of history will be

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[10] State law requires segregation in penal institutions (Ark. Stat. §§46-122, 46-144 to 46-147, 46-323 (1947)); and polling places (Ark. Stat. §3-910 (1947)); on motor carriers (Ark. Stat. §73-1747 to 73-1753 (1947)); and electric and street railroads (Ark. Stat. §73-1614 to 73-1619 (1947)); and in schools (Ark. Stat. §80-509, 80-544 to 80-547. (1947)). Ark. Stat. §6-817 to 6-824 (1947), requiring registration of persons promoting integration was held unconstitutional, *Smith* v. *Faubus*, 327 S. W. 2d 562 (1959).

on the proposition that the political power of the former segregating states is to no significant degree engaged in the present struggle.

It is true that the Fourteenth Amendment applies only to those actions in which state power is to some significant degree involved. Here, state power is involved to a significant degree in the racial discrimination practiced upon the petitioners because the state's regime of laws has failed to furnish protection from discrimination to petitioners.[11] The State's role here is not neutral; it has preferred the discriminator's insubstantial property claim to the petitioners' claim of equality. The Fourteenth Amendment overrides this state choice, for equal protection of the laws requires the states to protect the Negroes' claim of equality. *The Slaughterhouse* cases; 83 U. S. (16 Wall.) 36, 70-73; *Strauder* v. *West Virginia*, 100 U. S. 303, 306.

Finally, it is submitted that acceptance of the arguments advanced above need not foreclose protection of the genuinely private and personal choices of man. The substantive guarantees of the Fourteenth Amendment clearly protect petitioners from the state action involved in this case, but those guarantees are susceptible of reasonable interpretation. See Henkin, "Shelley v. Kraemer: Notes for a Revised Opinion," 110 U. Pa. L. Rev. 473 (1962). By careful interpretation, they can be limited in future cases to their incidence upon public life without any undesirable application to the truly private concerns of man.

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[11] This Court has long recognized that certain crucial abdications of governmental power—sometimes explained as affirmative decisions by government not to act—can make government responsible in the 14th Amendment sense. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 725; *Terry* v. *Adams*, 345 U. S. 461; *McCabe* v. *Atchison, Topeka & S. F. Ry.*, 235 U. S. 151.

II.

The Record Indicates That There Were Special Circumstances of Police Involvement in the Racially Discriminatory Scheme Which Would in Themselves Establish State Action in Violation of the Fourteenth Amendment.

Officer Baer of the Little Rock Police Department testified that on the morning of April 13, 1960 he was working his beat in the vicinity of the Blass Department Store when he observed a group of Negroes walk into the store (R. 49, 50). As he declared on the stand,

> "some went in the front door and some went in the Fourth Street side and I knew they were these sit-downers they have been called because most of them had their badges on and I followed them in and observed them sitting down upstairs" (R. 50).

After identifying petitioner Robinson as one of the group,[12] Officer Baer said, "I proceeded down and called headquarters and advised them" (R. 51). "They sent the Lieutenant and the Captain down there, talked to Mr. Trianfonte of the Blass store. He advised us of the situation there" (R. 51-52).

Officer Baer also testified that while observing the sit-in, "I talked to the store employee. I don't know his name and he advised he was waiting for the manager at the time" (R. 53). When asked whether he was present when any store employee had conversed with the demonstrators, the policeman said, "No, sir, I wasn't" (R. 52). When asked whether he had seen the demonstrators leave, he replied,

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[12] At one point, Officer Baer indicated that both petitioners were among the sit-in group (R. 52).

"When I came back outside from using the phone and the wagon had driven up and several police cars, they were beginning to come out."

None of Officer Baer's testimony is directly controverted by the prosecution's other witnesses. There is, of course, strong controversion of the state's version that the policemen were merely performing their ordinary duties when the store manager and his assistant rushed across the street for protection.

Officer Baer's testimony that he talked to a store employee when the demonstrators sat down clearly indicates that he was making every effort to insure that any possible offense would clearly fall within the words of this carefully worded "trespass" statute. This is a far cry from the mere neutral use of state machinery to enforce private discriminatory choice. Cf. *Lombard* v. *Louisiana, supra*; *Peterson* v. *City of Greenville, supra.*

CONCLUSION

Wherefore, for the foregoing reasons, petitioners pray that the petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

Opinion of the Supreme Court of Arkansas

SUPREME COURT OF ARKANSAS

Nos. 4992, 4994, 4997

CHESTER BRIGGS, *et al.*,

Appellants,

—v.—

THE STATE OF ARKANSAS,

Appellee,

Consolidated with

EUGENE D. SMITH, *et al.*,

Appellants,

—v.—

THE STATE OF ARKANSAS,

Appellee,

Consolidated with

JAMES FRANK LUPPER, *et al.*,

Appellants,

—v.—

THE STATE OF ARKANSAS,

Appellee.

Opinion Delivered May 13, 1963

APPEAL FROM PULASKI CIRCUIT COURT,
HON. WILLIAM J. KIRBY, JUDGE.

REVERSED AND DISMISSED IN PART.
AFFIRMED IN PART.

JIM JOHNSON, *Associate Justice*:

These are the so-called "sit-in" cases. They were submitted to this court on January 16, 1961. At that time there were cases claimed to be similar pending in other states.[1] By common consent our decision was delayed awaiting the outcomes of cases then pending in which petitions for certiorari to the United States Supreme Court had been filed. Since then additional petitions have been filed and there are now pending before the United States Supreme Court at least three cases of this nature in which certiorari has been granted. See *Avent* v. *North Carolina*, cert. 370 U. S. 934; *Peterson* v. *City of Greenville*, *cert.* 370 U. S. 935; *Lombard* v. *Louisiana*, 370 U. S. 935. We were particularly interested in the outcome of the "Garner cases", *Garner* v. *Louisiana*, 368 U. S. 157, 82 Sup. Ct. 248, 7 L. Ed. 2d 207, which appeared to be in point with the cases at bar. From the opinion of the United States Supreme Court in these cases, which were decided December 11, 1961, it developed that the cases did not involve a situation similar to ours and therefore afforded no persuasive authority.

While we originally intended to delay our decision until the United States Supreme Court had decided a case in point with ours, it is against our policy to delay for too long our decision in any pending case. We ascribe to the theory that justice delayed is justice denied. For many

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[1] *Henderson* v. *Trailways Bus Co.* (Va.), 194 F. Supp. 423; *Randolph* v. *Commonwealth* (Va.), 119 S. E. 2d 817; *State* v. *Williams* (N. C.), 117 S. E. 2d 824; *Samuels* v. *State* (Ga.), 118 S. E. 2d 231; *Briscoe* v. *State* (Tex.), 341 S. W. 2d 432; *Walker* v. *State* (Ga.), 118 S. E. 2d 284; *State* v. *Fox* (N. C.), 118 S. E. 2d 58; *Rucker* v. *State* (Tex.), 342 S. W. 2d 325; *Burton* v. *Wilmington (Del.) Parking Authority*, 365 U. S. 715; *Williams* v. *Hot Shoppes, Inc.*, C. A. D. C., April 20, 1961, No. 15610; *Gober* v. *City of Birmingham* (Ala.), 133 So. 2d 697.

years when this court goes into summer adjournment all cases ready for submission have been decided except some rare case like these which is carried over for a definite reason. These cases have now been pending for over two years. We do not feel that we can properly delay them longer to await a decision of the United States Supreme Court. In order to avoid carrying these cases over another summer we now proceed to a decision.

Our cases here were consolidated.[2] They consisted of three criminal prosecutions against 13 defendants. The prosecutions arise out of the activities of the defendants in seeking to be served at eating facilities maintained for whites, the defendants being Negroes. The three cases involve separate incidents at separate retail establishments. There are factual and legal differences necessitating a different disposition of the cases of one group of appellants as compared to the other two groups.

Case No. 4992, styled *Briggs et al.* v. *State*, is a prosecution under Act 226 of the Acts of 1959. It involves a "sit-in" at F. W. Woolworth Company in Little Rock on March 10, 1960.

Case No. 4994, styled *Smith et al.* v. *State*, is also a prosecution under Act 226 of the Acts of 1959. It involves a "sit-in" at Pfeifers Department Store in Little Rock on April 13, 1960.

Case No. 4997, styled *Lupper et al.* v. *State*, is a prosecution under Act 226 and also under Act 14. It involves a "sit-in" at the Gus Blass Store in Little Rock on April 13, 1960.

In the *Briggs* case, the evidence shows that the Negro defendants seated themselves at a lunch counter in Woolworth's and refused to leave when ordered to do so by

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[2] The cases were consolidated for briefing upon motion of appellants.

police officers. The evidence is undisputed that these defendants were not requested to leave by the management or by anyone with authority to act for the management.

In the *Smith* case, the record shows that all defendants but one left the premises promptly upon the request of the manager.

The *Lupper* case was tried to a jury and there is adequate evidence on behalf of the State to support a finding that these two defendants, James Frank Lupper and Thomas B. Robinson, refused to leave the Gus Blass Store at the request of the manager.

ACT 226 CASES

We see no distinction in fact or law between the three prosecutions under Act 226 of 1959. Therefore, we will discuss the three cases together insofar as Act 226 is concerned. Of course, it will be necessary to discuss the prosecution under Act 14 separately.

For reversal of the Act 226 cases, it is insisted that:

(1) The Act is unconstitutional because it denied defendants due process and equal protection of the law.

(2) The Act has been applied in an unconstitutional manner.

(3) The evidence was insufficient to support a conviction; and,

(4) The judgment was excessive and harsh.

Since we are of the opinion that Point 3 is well taken,[3] we will not pass upon the constitutionality of Act 226 of

[3] It is noted that these appellants were charged and convicted of a violation of Act 226 of 1959 exclusively and not for a violation of the prohibitions contained in Ark. Stats. §41-1401 or §41-1403, the general disturbance of the peace statutes.

1959. This is in accordance with the established rule of this court that constitutional questions will not be decided where the case may be disposed of on other grounds. *Bailey* v. *State*, 229 Ark. 74, 313 S. W. 2d 388; *Bowling* v. *State*, 229 Ark. 876, 318 S. W. 2d 808.

Section 1 of Act 226 of 1959 [§41-1432 Ark. Stats.] reads as follows:

> "Any person who shall enter any public place of business of any kind whatsoever, or upon the premises of such public place of business, or any other public place whatsoever, in the State of Arkansas, and while therein or thereon shall create a disturbance, or a breach of the peace, in any way whatsoever, including, but not restricted to, loud and offensive talk, the making of threats or attempting to intimidate or any other conduct which causes a disturbance or breach of the peace or threatened breach of the peace, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than five hundred dollars ($500.00) or imprisoned in jail not more than six (6) months, or both such fine and imprisonment."

Under this Act the prohibited offenses are creating disturbances or breaches of the peace. The Act sets forth loud and offensive talk, the making of threats and attempts to intimidate as examples of prohibited conduct. While there was some evidence on the part of the State to the effect that feeling and tension were high, the State offered no substantial evidence that these defendants entered the store to carry out a conspiracy to cause a breach of the peace, nor was there evidence that these defendants or any of them uttered any loud offensive talk, made any threats or attempted to intimidate anyone. The defendants had a

right to peacefully seek service at the lunch counters. By the same rule, management had a right to refuse to serve them. Since the peaceful efforts of the defendants to get service at the lunch counters were lawful, and in the absence of a substantial showing that such efforts were organized and calculated to disturb or breach the peace, it cannot be said here that the mere making of these efforts amounted to "creating a disturbance or breach of the peace." It is obvious that the Act contemplates a doing of that which the actor has no legal right to do. The defendants in the *Briggs* case refused to leave at the command of the police officers but in the absence of a request by management of the officers to order appellants to leave the premises, the officers had no right or authority to give such orders. There is no contention in this case that the officers had received such a request from management. Hence, the refusal of the defendants to leave was not unlawful and could not have been unlawful until they refused to leave at the request of the management or the officers in compliance with a request from management. In the *Smith* case all defendants but one left promptly at the request of the management. Certainly those leaving were guilty of no offense. The case of the one individual (in the *Smith* case) who did not leave promptly gives us more concern. However, we are constrained to believe that any unrest, tension or disturbance existent in the Pfeifer store at that time had already been created by the lawful efforts of all the defendants to obtain service. There is no showing that this act of the defendant created a disturbance or breach of the peace. A different question would be presented had this defendant been prosecuted under Act 14 of 1959 but no such charge was placed against him.

The point which we wish to make completely clear is that the mere fact that the exercise of a lawful right may

result in a disturbance or breach of the peace does not make the exercise of that right a violation of the law so long as the right is exercised in a peaceful manner and without force or violence or threats of same. Therefore, we conclude that all defendants in all prosecutions under Act 226 of 1959 should have been acquitted.

In the *Lupper* case, which involves violations of Act 14 of 1959, as well as violations of Act 226, the appellants make the same contentions as to Act 14 as are made as to Act 226 and an additional point is raised as to alleged error in refusing to give certain instructions.

DUE PROCESS & EQUAL PROTECTION OF LAWS

Section 1 of Act 14 of 1959 [§41-1433 Ark. Stats.] reads as follows:

> "Any person who after having entered the business premises of any other person, firm or corporation, other than a common carrier, and who shall refuse to depart therefrom upon request of the owner or manager of such business establishment shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00) or by imprisonment not to exceed thirty (30) days, or both such fine and imprisonment."

Appellants assert that Act 14 is unconstitutional in that it denies them equal protection of the laws and due process as guaranteed by the Fourteenth Amendment to the Constitution of the United States and Section 8 of Article II of the Constitution of Arkansas, and cite *United States* v. *Miller*, 17 F. Supp. 65; and *Lanzetta* v. *New Jersey*, 306 U. S. 451, —— Sup. Ct. — —, 83 L. Ed. 888. It is contended

that the Act is so vague as to make it impossible to determine what conduct might transgress the statute. It is said that the Act provides no ascertainable standard of criminality. With these contentions we cannot agree. The Act clearly, specifically and definitely makes the failure to leave the business premises of another upon request of the owner or manager a misdemeanor.

It is suggested that the Act could be construed so as to allow an owner or manager to invoke the same because a customer was demanding a refund of money paid for merchandise or because a customer was demanding a delivery of merchandise which he had purchased. Assuming this to be true, we see no reason why the Act amounts to a denial of due process or equal protection of the laws. To remain upon the premises of another after having been requested to leave amounts to a trespass. *State* v. *Clyburn*, 247 N. C. 455, 101 S. E. 2d 295. This does not mean that under the hypothesis suggested by appellants that the aggrieved customer would have no remedy because if management had failed to return his money or deliver merchandise purchased, an action would lie in the courts of this State and the customer could be fully compensated for the failure to return the money or deliver the merchandise. A bill collector has a right to attempt to collect what is due him but he has no right to commit a trespass in the process.

By its terms and on its face, the statute applies to all who refuse to leave and it is not restricted to negroes. There is nothing uncertain, indefinite or vague about Act 14. It prohibits trespass.

While the Legislature and not this court determines public policy by statutory enactments, we feel that it is a wise policy to prevent possible violence and bloodshed by

providing criminal sanctions against trespass. We have held that a citizen of this State may use force and violence short of killing to protect his property against trespass even though the trespasser makes no effort to commit a felony. *Carpenter* v. *State*, 62 Ark. 286, 36 S. W. 900. The statute here in question simply provides a means whereby the owner of property may be protected in his use and possession of such property without having to resort to force and violence. We are impressed with the proposition that without this salutary statute, violence in repelling trespassers could become commonplace. Certainly, it is in the interest of the public and a valid exercise of the police power to protect the public peace by criminal sanction against trespass. Article 2, §22 of the Constitution of Arkansas in part is as follows:

> "The right of property is before and higher than any constitutional sanction. . . ."

The right to hold and enjoy property free from interference by others is one of the most precious rights enjoyed by the citizens of this State. They are entitled to be protected in this right against all trespassers without regard to whether they are colored or white.

The appellants complain that the Act does not require any *mens rea* or criminal intent on the part of the offender. We again disagree; the intent to remain after being requested to leave is a criminal intent.

Unconstitutional Application of Act 14

The appellants contend that Act 14 has been unlawfully and unconstitutionally administered because it is said that the Act would not be invoked or enforced against a white man under the same or similar circumstances, thereby deny-

ing appellants equal protection of the laws. There is absolutely no evidence in the record to justify such an assertion. On its face the Act is applicable to all persons without regard to race. Appellants made no effort to adduce evidence to prove that white persons had violated the Act; that these violations were known to the officers and prosecuting authorities and that no arrests and prosecutions had followed such violations. Such proof would have been necessary in order to justify the present contention. See: *Taylor* v. *City of Pine Bluff*, 226 Ark. 309, 289 S. W. 2d 679, certiorari denied, 352 U. S. 894, 77 Sup. Ct. 125, 1 L. Ed. 2d 85; also see: *Yick Wo* v. *Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; *Snowden* v. *Hughes*, 321 U. S. 1, 64 Sup. Ct. 397, 88 L. Ed. 497; *Hickinbotham* v. *State*, 227 Ark. 1032, 303 S. W. 2d 565.

The appellants have not shown, nor have we been able to find from the record, a single discriminatory act on the part of the State in the enforcement of this statute. It is not unusual for persons charged with crime to assert "discrimination", however, unsupported assertions cannot be held to take the place of evidence.

STATE ACTION

Appellants further assert that the Act has been unconstitutionally applied in that the enforcement of such Act amounts to "state action" in violation of the 14th Amendment to the Federal Constitution. They cite, *inter alia*, *Shelley* v. *Kraemer*, 334 U. S. 1, 68 Sup. Ct. 836, 92 L. Ed. 1161; *Hurd* v. *Hodge*, 334 U. S. 24, 68 Sup. 847, 92 L. Ed. 1187; *Barrows* v. *Jackson*, 346 U. S. 249, 73 Sup. Ct. 1031, 97 L. Ed. 1586; and *Valle* v. *Stengel*, 176 F. 2d 697. This argument is completely untenable because it presupposes a right in the Negro defendants to be served by the lunch

counter operators. In all of the cited cases from the Supreme Court of the United States it is either assumed or specifically stated that the Negroes involved had a right to own and occupy the property in question. In the *Valle* case, the State of New Jersey had enacted a statute giving all persons, irrespective of color, the right to admission of places of public accommodation such as the swimming pool there in question.

There is no right in these defendants under either State or Federal law to compel the owners of lunch counters to serve them. Many states have enacted so-called "public accommodation" statutes but Arkansas is not among them. The Fourteenth Amendment does not guarantee any such right to the appellants.

Appellants place great reliance on the language in *Valle* v. *Stengel*, *supra*, with reference to the right to contract. However, a reading of the *Valle* case shows that the court merely held that the Fourteenth Amendment and the Federal Civil Rights Statutes only guaranteed to Negroes "a civil status equivalent to that enjoyed by white persons." As previously mentioned, New Jersey had a "public accommodation" statute guaranteeing to all persons, regardless of color, the right to admission to the swimming pool in question. This is considerably different from the situation in the case at bar. Arkansas has no "public accommodation" statute. Management can arbitrarily order white persons to leave lunch counters for any reason whatever. While appellants expound forcefully of the equal privileges and immunities provisions of the Fourteenth Amendment, we cannot escape the conclusion that they are urging this court to grant them an unequal privilege, that is the right to be served in a restaurant because they are colored, even though a corresponding right does not exist in white per-

sons. Appellants' argument must fail because they, regardless of color, had no right or privilege to be served. To hold otherwise would be to employ judicial fiat to coerce unwilling lunch counter operators to afford service to patrons they do not want and did not seek. It can add nothing to the argument to say that they did not want appellants because of their color because appellants had no basic right to be served and the State's action in enforcing the criminal laws against trespass cannot be held to be "state action" abridging the privileges or immunities of citizens of the United States. There is no privilege or immunity to trespass on private property. It should be remembered that the operators of the lunch counter in question have a right not to be deprived of their property without due process of law. This right is guaranteed to them under the same provisions of the Constitution now sought to be invoked by appellants. To hold that anyone may trespass at will simply because his color is different from that of the property owner and that the law is powerless to protect the injured party would be inviting property owners to provide their own means of evicting trespassers. This would not be consonant with the principles of a nation which regards good order as one of the fundamental objectives of society. The Supreme Court of the United States has approved a municipal ordinance designed to prevent trespass by providing that it should be unlawful for magazine subscription solicitors to go upon private property for the purpose of soliciting orders without having been requested or invited to do so. *Breard* v. *Alexandria*, 341 U. S. 622, 71 Sup. Ct. 920, 95 L. Ed. 1233. In the *Breard* case the court rejected arguments of the appellant solicitor that the ordinance violated: (a) The due process clause of the Fourteenth Amendment; (b) The

Federal Commerce Clause; (c) The guarantees of the First Amendment of freedom of speech and the press (made applicable to the states by the Fourteenth Amendment).

In the *Breard* case the court said:

> "Since it is not private individuals but the local and federal governments that are prohibited by the First and Fourteenth Amendments from abridging free speech or press, *Hall* v. *Virginia* does not rule a conviction for trespass after notice by ordinance. However, if as we have shown above, p. 1247, a City Council may speak for the citizens on matters subject to the police power, we would have in the present prosecution the time-honored offense of trespass upon private grounds after notice. Thus, the *Marsh* and *Tucker* cases are not applicable here."

We think the quoted language makes it abundantly clear that the act of discrimination in refusing service is that of the individual and thus not subject to the interdiction of the Fourteenth Amendment. The same language also makes it clear that in prosecuting for trespass the State is making a valid exercise of police power. In other words, it makes no difference as to why the individual lunch counter operator did not want the appellants on the premises, because if they remained after a request to leave they became trespassers and the State prosecuted for trespass and not to enforce discrimination.

SUFFICIENCY OF EVIDENCE IN LUPPER CASE

As previously mentioned, there was sufficient evidence to support the verdict of the jury in finding that the defendants Lupper and Robinson refused to leave the premises after having been requested to do so by the manager.

It is not our province to pass upon the weight of the evidence. It requires no citation of cases as to the familiar rule that we may not go behind the verdict of a jury which is supported by substantial evidence.

REFUSAL OF REQUESTED INSTRUCTIONS

The appellants complain of the action of the trial court in refusing to give two instructions requested by them. However, a comparison of the instructions which were refused with those which were given by the court makes it crystal clear that the subject matter of the rejected instructions was adequately covered by the instructions given. *Harrison* v. *State,* 222 Ark. 773, 262 S. W. 2d 907.

EXCESSIVENESS AND HARSHNESS OF JUDGMENT

The appellants contend that the fines and punishment meted out to them were excessive and harsh even though they did not exceed the penalties provided by Act 14. This contention has been rejected many times by this court. See: *Johnson* v. *State,* 214 Ark. 902, 218 S. W. 2d 687.

CONCLUSION

For the error indicated, the convictions under Act 226 of 1959 are reversed and the cases having been fully developed are dismissed.

The convictions of Lupper and Robinson under Act 14 of 1959 are affirmed.

Robinson, J., dissents in part; Holt, J., disqualified.

Judgment of the Supreme Court of Arkansas

IN THE SUPREME COURT OF ARKANSAS

October Term, 1962—May 13, 1963

CHESTER BRIGGS *et al.*,

Appellants,

—v.—

THE STATE OF ARKANSAS,

Appellee.

Appeal from Pulaski Circuit Court, First Division

JUDGMENT

This cause came on to be heard upon the transcript of the record of the circuit court of Pulaski County, First Division, and was argued by counsel; on consideration whereof it is the opinion of the Court that so much of the proceedings and judgment of said circuit court involving the convictions of appellants Lupper and Robinson under Act 14 of 1959 should be affirmed.

It is, therefore, considered by the Court that so much of the judgment of said circuit court in this cause rendered be, and the same is hereby, affirmed.

But it is further the opinion of the Court that there is error in so much of the proceedings and judgment of said circuit court in this cause which upheld the convictions of all the appellants under Act 226 of 1959.

It is, therefore, considered by the Court that so much of the proceedings and judgment of said circuit court be, and

the same is hereby, reversed, annulled and set aside; and that this cause be dismissed.

It is further considered that said appellants recover of said appellee all their costs in this Court, in this cause expended. ROBINSON, *J.*, dissents in part; HOLT, *J.*, disqualified.

May 13, 1963

Supplemental Opinion of the Supreme Court of Arkansas Denying Rehearing

SUPREME COURT OF ARKANSAS

No. 4997

Opinion Delivered June 3, 1963

JAMES FRANK LUPPER, *et al.*,

Appellants,

—v.—

THE STATE OF ARKANSAS,

Appellee.

On Rehearing

Rehearing denied

JIM JOHNSON, *Associate Justice*

Subsequent to the opinion delivered by this court in *Lupper* v. *State* on May 13, 1963, the United States Supreme Court on May 20, 1963, rendered opinions in four "sit-in" cases the pendency of which was specifically referred to in our opinion as cases in the nature of and similar to the cases at bar. The four cases are *Avent* v. *North Carolina*, #11; *Peterson* v. *City of Greenville*, #71; *Lombard* v. *Louisiana*, #58; and *Gober* v. *Birmingham*, #66.

Within the time prescribed by the rules of this court, appellants have petitioned for a rehearing urging reconsideration of our opinion in the light of these recent pronouncements of the United States Supreme Court.

A careful examination of copies of the official opinions in these cases furnished us by the Government Printing

Supplemental Opinion of the Supreme Court of Arkansas Denying Rehearing

Office discloses that the court (in *Lombard* v. *Louisiana*, #58) summarized its own holdings as follows:

> "We have . . . held . . . that where an ordinance makes it unlawful for owners or managers of restaurants to seat white and Negroes together, a conviction under the State's criminal processes employed in a way which enforces the discrimination mandated by that ordinance cannot stand. Equally the State cannot achieve the same result by an official command which has at least as much coercive effect as an ordinance."

In compliance with petitioners' request for review, we have reexamined our opinion in the light of the cited cases and find that appellants did not claim nor was there any showing made relative to the existence of a state law or municipal ordinance in the City of Little Rock which made it unlawful for owners or managers of restaurants or lunch counters to seat whites and Negroes together. Further, appellants did not claim nor was there any showing made that any official command was issued which could remotely have the coercive effect of a law requiring segregation of the races in restaurants or lunch counters. In fact, from our assiduous review of the entire record before us, we have been unable to find any claim, evidence or showing indicating in the slightest respect that the decision of the manager in the case at bar do exclude these petitioners from the lunch room was anything except the exercise of freedom of choice. Having thus reviewed our opinion in the light requested, rehearing is denied.